Filed 3/30/09 Newport Properties v. Land America Property Inspection Services CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NEWPORT PROPERTIES, LLC, Plaintiff and Appellant, v. LAND AMERICA PROPERTY INSPECTION SERVICES, INC., et al., Defendants and Respondents.	G040618 (Super. Ct. No. 30-2008-001030-96) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

The Arnot Law Firm, Philip M. Arnot and Stephen P. Arnot for Plaintiff and Appellant.

Millar, Hodges & Bemis and Richard W. Millar, Jr., for Defendants and Respondents.

The trial court sustained the demurrer of defendants Land America Property Inspection Services, Inc. and one of its property inspectors, Daniel Sterling, to plaintiff Newport Properties, Inc.'s complaint for negligence without leave to amend. Plaintiff appeals contending the court erroneously concluded its complaint failed to allege recoverable damages and abused its discretion in not granting leave to amend. We find no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

Because this case comes to us following the sustaining of a demurrer, we assume the following facts, but not the conclusions, set forth in the complaint to be true. (*Andonagui v. May Dept. Stores Co.* (2005) 128 Cal.App.4th 435, 439.)

Plaintiff entered a contract to sell a Newport Beach house it owned to Nicholas and Rhonda Sciortino for almost $8 million. The Sciortinos hired defendants to conduct a property inspection. While conducting the inspection, Sterling stepped on and broke a fire sprinkler pipe in the attic, causing the attic to flood and water damage to the floor below. The Sciortinos agreed to extend the escrow period until the damages were determined but once that was done and upon receipt of the estimated repair time they canceled the contract and demanded their deposit be refunded. Plaintiff "returned the . . . deposit and agreed to cancel out the escrow since [it] could not deliver possession of the real property in its current condition and the Sciortinos were not willing to wait for repairs to be completed."

The cost to repair the interior damage was $67,594.99, which defendants paid. Plaintiff ultimately sold the house to another buyer but at a lower price.

Plaintiff sued defendants for negligence, seeking the difference between the canceled contract price and the price at which the house ultimately sold (characterized as "lost profits") and "holding costs" incurred in maintaining the property until it was sold

such as "property insurance[,] taxes, mortgage interest, utilities, and homeowner's fees." Defendants demurred on the ground plaintiff was only entitled to the repair damages that had already been paid. The trial court sustained the demurrer without leave to amend and entered judgment for defendants, stating the analysis of *Safeco Ins. Co. of America v. J & D Painting* (1993) 17 Cal.App.4th 1199 (*Safeco*) applied and "[as] plaintiff ha[d] already pleaded that the only other recoverable damage of out of pocket repair expenses have been paid, [it] has no remaining recoverable damages."

DISCUSSION

1. Sufficiency of Allegations for Negligence Cause of Action

We review de novo the court's order sustaining defendant's demurrer without leave to amend. (*Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1264.) "[A]ssum[ing] the truth of all properly pleaded facts and consider[ing] any judicially noticed documents[,] . . . [w]e give the complaint a reasonable interpretation and determine whether it states facts sufficient to constitute a cause of action under any legal theory. [Citation.]" (*Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 463.)

Plaintiff contends Civil Code section 3333 (all statutory references are to this code) entitles it to recover all his alleged damages, not just the cost of repairs. The statute reads, "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." (§ 3333.) But although the scope of damages recoverable under section 3333 is broad, it is not limitless and does not allow for recovery simply because a tortious act was the cause in fact ("but for causation") of the harm suffered. Rather, it

requires the detriment be proximately caused by the act. (*Safeco*, *supra*, 17 Cal.App.4th at p. 1204.)

In *Safeco*, the defendant negligently caused fire damage to the plaintiff's home. After the insurance company paid him for repairs and loss of use and settled with the defendant, the plaintiff filed a separate complaint alleging the real estate market declined significantly during the five months it took to repair the damage and that his property had depreciated substantially. He sought to recover the loss in value of the house plus the extra mortgage interest payments he had to pay. *Safeco* rejected the plaintiff's claims as inconsistent with the general rule that the proper measure of damages for negligent damage to real property is the lesser of the "cost of repair or the diminution in value but not both. [Citation.]" (*Safeco*, *supra*, 17 Cal.App.4th at p. 1202.)

The court acknowledged the plaintiff "might be able to show that, but for [the defendant's] negligence, he would have been able to sell his house earlier for more than he now can obtain." (*Safeco*, *supra*, 17 Cal.App.4th at p. 1204.) Nevertheless, it observed "[t]he rule for recovery in tort has never rested solely on 'but for' causation (cause in fact), but has also been based on proximate cause. Thus . . . section 3333 mandates recovery not simply for all detriment caused by defendant's negligence, but for all detriment *proximately caused* thereby. The wording of the statute is manifestly designed to make the trier of fact focus closely on the issue of proximate cause. [¶] A superseding cause utterly unrelated to the defendant's negligence breaks the chain of proximate causation and is a bar to recovery. '"Liability cannot be predicated on a prior and remote cause which merely furnishes the condition or occasion for an injury resulting from an intervening unrelated and efficient cause, even though the injury would not have resulted but for such condition or occasion; . . ."' [Citations.] Although [the plaintiff] might have sold his house at a high price but for [the defendant's] negligence, the decline in the market bore no relation whatsoever to the acts of [the defendant]. [The

defendant's] negligence, if such there was, was merely the condition or occasion for the market decline to affect [the plaintiff's] house." (*Id.* at p. 1204.)

The same pertains here. Applying *Safeco*'s words to the present case, "[Plaintiff] has recovered the cost of repair, the house has been repaired, and [it] possese[d] exactly the same property [it] had before. Indeed, [it] may in one sense [have been] better off, since a large part of [its] property [was] newly constructed." (*Safeco, supra,* 17 Cal.App.4th at p. 1203, fn. omitted.)

Plaintiff distinguishes *Safeco* on the ground that it had a "binding real estate contract with the Sciortinos" and incurred holding costs, "including, but not limited to, property insurance[,] taxes, mortgage interest, utilities, homeowner's fees, and other incidental costs" while the property was being repaired and another buyer located. But there is nothing unusual about these costs and plaintiff would have had to pay them regardless until the property was sold. The complaint failed to allege any extraordinary costs incurred while the property was being repaired, such as for loss of use (see *Safeco, supra,* 17 Cal.App.4th at p. 1202 [the defendant paid for repairs and loss of use]). *Safeco* did not allow the plaintiff to recover holding costs similar to those claimed here (*Safeco, supra,* 17 Cal.App.4th at p. 1202) and the fact there was no contract involved in that case is irrelevant in our view.

"[T]he loss in value of destroyed property is measured as the difference between the value immediately before the tort and the value *immediately* after. [Citation.]" (*Safeco, supra,* 17 Cal.App.4th at p. 1203, fn. 1.) In rejecting the claim for the diminution in value, *Safeco* determined the plaintiff's assertion "he was 'unable to sell' the property during the period between the fire and the completion of the repairs unjustifiably assumes the damaged property could not be sold. No reason appears why he could not have sold the property immediately at a reduced price and recovered from the insurer the difference between what he received and the market value." (*Ibid.*)

Nor has plaintiff offered any reason here. Had it immediately sold the property and recovered the difference in value, which, as *Safeco* notes, "would presumably have approximated the cost of repairs" (*ibid*.), it would not have incurred any holding fees.

Although plaintiff argues a number of cases have not applied *Safeco*'s "hard and fast rule," he concedes these are "not factually on point." Moreover, none hold that a plaintiff in an action for negligent damage to real property may recover *both* the cost of repairing the damage and restoring the premises to their original condition *plus* the diminution in value of the property.

Strebel v. Brenlar Investments, Inc. (2006) 135 Cal.App.4th 740 did not involve negligent damage or injury to any type of property. Rather, the court determined the "proper measure of damages under section 3333 for a real estate broker's intentional fraud" (*id*. at p. 748), an issue not present in this case.

Plaintiff is correct that *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565 recognized "there is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property, and whatever formula is most appropriate in the particular case will be adopted . . . ." (*Id*. at p. 576.) But *Mozzetti* also held that "[i]n a case involving damage to plaintiff's property due to defendant's negligence, the general rule is that if the cost of repairing the injury and restoring the premises to their original condition amounts to less than the diminution in value of the property, such cost is the proper measure of damages; and if the cost of restoration will exceed such diminution in value, then the diminution in value of the property is the proper measure. [Citations.]" (*Ibid*., italics omitted.) *Mozzetti* concluded the trial court had prejudicially erred in instructing the jury in a manner that allowed it to award both cost of repair and the diminution value of the property because that permitted a cumulative or double recovery in contravention of the general rule. (*Id*. at pp. 577-578.)

Nor do plaintiff's other cited cases permit such double recovery. *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439 discussed the different "measure of damages for the destruction or injury to fruit, nut or other productive trees," including "the difference in the value of the land before and after the destruction or injury[]" (*id*. at p. 447) versus the "costs of replacing the trees or restoring the property to its condition prior to the injury[]" (*ibid*.), but "express[ed] no opinion on the most appropriate measure of damages in [that] case . . . ." (*Id*. at p. 448.) *United States v. Union Pacific Railroad Co*. (E.D.Cal. 2008) 565 F.Supp.2d 1136 merely found that diminution in the market value was not an appropriate measure of damages in that case involving fire damage to approximately 52,000 acres of national forest because no real estate market value existed for such lands; rather California and Ninth Circuit law governing the appropriate measure of damages for fire injuries to forest lands applied. (*Id*. at pp. 1143, 1145.)

Similarly, although *Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 acknowledged "[d]iminution in market value . . . is not an absolute limitation" as plaintiff asserts, the alternative measure of damages the court considered was "the cost of restoring the property to its condition prior to the injury. [Citations.]" (*Ibid*., fn. omitted.) Because that cost was more than diminution in value and "[c]ourts will not normally award costs of restoration if they exceed the diminution in value of the property" (*ibid*.), *Heninger* invoked the "personal reason" exception to the general rule under which "[r]estoration costs may be awarded even though they exceed the decrease in market value if 'there is a reason personal to the owner for restoring the original condition . . . .'" (*Id*. at pp. 863, 864.) This exception has no application here given that the repairs have already been made and paid for.

We conclude plaintiff's complaint fails to allege recoverable damages, a necessary element of its negligence cause of action. (*Ortega v. Kmart Corp*. (2001) 26

Cal.4th 1200, 1205.) The trial court did not err in sustaining the demurrer to plaintiff's negligence cause of action against defendant.

2. Denial of Leave to Amend

Plaintiff asserts the court should have allowed it an opportunity to amend "[b]ased on the previous arguments." We review denial of leave to amend for abuse of discretion. [Citation.]" (*Hailey v. California Physicians' Service*, *supra*, 158 Cal.App.4th at p. 463.) "[T]he burden falls squarely on [plaintiff] to show what facts he could plead to state a cause of action if allowed the opportunity to replead. [Citation.] To meet this burden a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action. [Citations.] Absent such a showing, the appellate court cannot assess whether or not the trial court abused its discretion by denying leave to amend." (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 890.)

Plaintiff failed to carry its burden. It did not request leave to amend, submit a proposed amended complaint, or enumerate any facts on appeal that would remedy its inability to recover its claimed damages for lost profits and holding costs. In particular, it failed to show it could amend the complaint to allege unusual costs or expenses incurred while the property was being repaired that it would not normally have sustained in the absence of defendant's negligence. Thus, we cannot say the trial court's order sustaining the demurrer without leave to amend constituted an abuse of discretion.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.